

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION**

**THE DETROIT EDISON COMPANY and
THE BARTECH GROUP, INC.¹**

Joint Employers

and

Case 7-RC-23329

**LOCAL 223, UTILITY WORKERS UNION
OF AMERICA, AFL-CIO**

Petitioner

APPEARANCES:

Craig Stanley, Attorney, Detroit, Michigan, for The Detroit Edison Company.
Merritt Bumpass, Attorney, Cleveland, Ohio, for The Bartech Group, Inc.
L. Rodger Webb, Attorney, Southfield, Michigan, for the Petitioner.

DECISION AND DIRECTION OF ELECTION

Upon a petition filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record² in this proceeding, the undersigned finds:

1. The hearing officer's rulings are free from prejudicial error and are affirmed.
2. The Joint Employers are each engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.

¹ The names of the Joint Employers appear as amended at the hearing.

² The Detroit Edison Company and the Union filed timely briefs in this matter, which were carefully considered.

3. The labor organization involved claims to represent certain employees of the Joint Employers.

4. A question affecting commerce exists concerning the representation of certain employees of the Joint Employers within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

OVERVIEW

The Petitioner³ seeks to represent all employees jointly employed by The Detroit Edison Company (Edison) and The Bartech Group, Inc. (Bartech) employed at Edison's Fermi 2 Nuclear Power Plant (Fermi 2), located in Newport, Michigan.⁴ The lone issue presented here is whether Edison and Bartech are joint employers of the employees in the petitioned-for units. Edison contends that it is not a joint employer with Bartech and that Bartech alone employs the employees in the petitioned-for units. Bartech did not add anything further to Edison's position. The Petitioner contends that Edison is, at a minimum, a joint employer with Bartech.

I find that Edison and Bartech are joint employers because each exercises control over substantial terms and conditions of employment of the employees in the petitioned-for units.

THE EMPLOYERS' OPERATIONS

Edison generates, sells, and distributes electricity to residential and commercial customers. DTE Energy Corporate Services, LLC is the holding company for Edison and also distributes gas to non-regulated businesses in other technologies. There are approximately 950 workers employed at the Fermi 2 power plant. There are approximately 54 employees working on-site who are employed by Bartech. Bartech has provided Edison with temporary staffing services for over ten years. Its current service contract expires on January 5, 2011. Bartech provides the same staffing services to numerous other customers, such as those in the automotive and IT service industries. Connie Gabryszewski is Bartech's only on-site representative at Fermi 2.

³ The Petitioner currently represents employees employed by The Detroit Edison Company. The parties stipulated that there is no prior labor relations history at this location involving the employees in the petitioned-for unit and no union has ever been recognized or certified as bargaining representative of these employees.

⁴ The parties stipulated to the appropriateness of two specific units: Unit A, comprised of all full-time and regular part-time office clerical employees; Unit B, comprised of technical employees, plant clericals including but not limited to business technicians, engineer technicians, graphic specialists, procedure writers and stockmen.

THE RELATIONSHIP BETWEEN EDISON AND BARTECH

Edison notifies Bartech when it needs to fill a clerical, business technician, engineer technician, graphic specialist, procedure writer and/or stockman position. Edison establishes the job specifications such as the qualifications, duties, and responsibilities and relays this information to Bartech. Bartech then reviews its applicant pool before selecting applicants whose qualifications best meet the Employer's requirements. It then interviews applicants from this winnowed down list and sends their resumes to Edison. Edison then informs Bartech whom it wants to interview. Bartech's policy is to send at least three prospects to its customers, although Edison could decide it wants more. Once Edison decides whom it wants to hire, it notifies Bartech. Bartech extends the offer of employment to the individual.

Edison and Bartech have separate human resource departments. Once prospects accept a position, they report to Bartech's corporate offices in Detroit, Michigan, where they fill out an employee agreement with Bartech consisting of their name, start date, job title, wage rate, and benefits accepted. New employees are also given a Bartech employee handbook. Bartech maintains, at its corporate office, a personnel file on each employee it contracts to Edison at Fermi 2. Edison does not maintain such files on the Bartech employees employed at Fermi 2.

Bartech employees are allowed to enroll in a health plan under Bartech's group rate and participate in Bartech's 401(k) plan. Bartech employees are not able to participate in Edison's healthcare plan. None of Edison's human resource policies are applicable to Bartech employees, and Edison's human resource department performs no functions for Bartech. Indeed, Edison's human resource employees deal only with Edison's regular employees.

Once an individual accepts a position, Edison performs a background check. Bartech plays no role in this check. The Nuclear Regulatory Commission (NRC) requires that all people who have access to a facility such as Fermi 2 are subject to this background check. If prospective employees fail the background check, they are not hired. Edison also pays for mandatory drug and alcohol tests. Individuals who pass the background check and drug and alcohol tests are hired and receive badges that allow them access to the Fermi 2 plant.⁵ The badge contains the employee's picture and bears the Edison name.

Day-to-Day Operations and Wages

When Bartech employees begin working at Fermi 2, Edison trains them, determines their work hours, which holidays they qualify for, and any overtime. Bartech employees may refuse overtime without being disciplined. Bartech employees share with

⁵ The record is silent as to what happens when a current employee fails his/her background recheck.

Edison employees the same break room/cafeteria, park in the same parking lot, and are positioned throughout Fermi 2 along side Edison employees. Bartech employees dress according to Edison's policy. Edison supervises these employees without any input or interference from Bartech.

The agreement between Edison and Bartech establishes the contract rate that Edison pays Bartech for each job classification. Bartech determines the specific wage rate it will offer its employees who fill such classifications. That said, in early 2009, Edison informed Bartech that due to Edison's financial situation, it needed to reduce the contract rates it paid Bartech by 7.5 to 15 percent. As a result, Bartech reduced employee wages by 7.5 to 15 percent. Edison has made clear that due to the current economic climate, no raises will be given to Bartech employees in the near future.⁶

All Bartech employees input their own time into the Edison computer software. To input a Bartech employee's time, the employee must first have a purchase order number. This time is run through a program called SAP. It has the bill rate to Bartech from Edison. They then print out their own time sheet, which is approved by their Edison supervisor. The employee then inputs the information into Edison's Maximo software. This information goes back into SAP and is e-mailed or faxed to Bartech for payroll processing. Bartech then issues paychecks to these employees. The paychecks contain no reference to Edison whatsoever. On the other hand, Edison employees do not enter their time. Instead, Bartech clerical employees enter Edison employees' time into the Maximo program.

Attendance Policies

Edison's attendance policy is as follows: Edison employees with "non-managed" absences exceeding 40 hours in a rolling 12-month period are subject to discipline. Edison employees are disciplined according to its positive discipline plan: (1) oral reminder, (2) written warning, (3) one day off paid time, and (4) termination. Bartech employees are not subject to Edison's positive discipline plan.

Bartech requires its employees to report to work "on time every scheduled workday." Bartech employees are required to notify both their Edison supervisor and Gabryszewski within the first 15 minutes of the workday if they are going to be absent or late in arriving to work.

If a Bartech employee has attendance problems, his or her Edison supervisor will alert Gabryszewski and she determines the appropriate action, including meeting with the employee to discuss the problem and crafting a performance improvement plan. Edison is not involved in the crafting of such plans.

⁶ The record is silent as to whether this also applies to Edison employees.

While Bartech and Edison do have different attendance policies, Edison supervisors rely on Edison's attendance policy as a basis from which to flag Bartech employees. Once flagged, determining the appropriate course of action falls on Gabryszewski. Hence, if Edison employees have attendance issues, they are subject to Edison's positive discipline program. If Bartech employees have attendance issues, they are subject to Bartech's disciplinary plan, as determined by Gabryszewski. That said, as a practical matter, Bartech employees have very little, if any, contact with Gabryszewski.

Evaluations Regarding Work Performance

Edison employees are evaluated under Edison's employee appraisal program. Edison supervisors meet with employees and develop goals and plans. These goals and plans are reviewed twice a year; mid term and at the end of the year.

Bartech evaluates its employees annually; however, it relies on Edison supervision to assess the employee's performance. An evaluation form created by Bartech is sent to Edison for the employee's supervisor to complete. Once the Edison supervisor completes the evaluation form, it is forwarded to Gabryszewski, who then meets with the employee to discuss and review the document. She never changes the content of the evaluation form. Her role is strictly to review the document with the employee. If an employee takes issue with his or her evaluation, the employee meets with Gabryszewski and the Edison supervisor who completed the evaluation form.

Converting a Bartech Employee to an Edison Employee

In the past, Edison has requested that a Bartech employee be converted to an Edison employee.⁷ The requested employee must then pass tests administered at Edison headquarters. The person is hired if he or she meets Edison's requirements. Also, if Edison has a position it has not filled internally, the position is open to the general public, including Bartech employees. On one occasion, a Bartech employee employed as a senior buyer was reduced from full-time to part-time as an alternative to Edison terminating her employment. Bartech was not involved with this decision.

Discipline and Discharge

Gabryszewski has been employed by Bartech for over 10 years. Since that time, she has been involved in the discharge of four Bartech employees. With respect to those employees, Edison informed her that it wanted to terminate the employment relationship. The record does not establish who these individuals were, or when their employment at Fermi 2 was terminated. In those instances, Gabryszewski, not Edison supervision, notified the employees of their termination with Edison. Once these employees were

⁷ The record is silent as to the identity of those individuals transferred and the dates on which the transfers occurred.

terminated from Edison's employment, they were returned to the Bartech applicant pool for potential placement elsewhere. There was one instance where a Bartech employee was to be disciplined for an infraction. The Edison supervisor spoke to Gabryszewski who stated that the employee should receive time off. The record is silent as to how much time off was given. Edison directed Gabryszewski to follow Bartech's disciplinary policy.

ANALYSIS

In order to establish that two or more employers are joint employers, the entities must share or codetermine matters governing essential terms and conditions of employment. *NLRB v. Browning-Ferris Industries*, 691 F.2d 117 (3d Cir. 1982); *Aldworth Co., Inc.*, 338 NLRB 137 (2002); *Riverdale Nursing Home*, 317 NLRB 881, 882 (1995). The essential factor to be examined is whether one employer possesses sufficient control over the work of the employees of another employer. *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964) (the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction). *Riverdale*, *supra* at 882, *citing TLI, Inc.*, 271 NLRB 798 (1984). In finding companies to be joint employers, the Board assumes in the first instance that companies are "what they appear to be"—independent legal entities that have merely "historically chosen to handle jointly...important aspects of their employer-employee relationship." *Checker Cab Co. v NLRB*, 367 F.2d 692, 698 (6th Cir. 1966).

In the instant case, Bartech alone selects employees for referral to Edison. They remain on Bartech's payroll. Bartech pays the Bartech employees working at Fermi 2 and deducts applicable health insurance benefits. On the other hand, Edison alone assigns, directs and supervises the Bartech employees, establishes contract rates for each position filled by a Bartech employee, evaluates their job performance, albeit on a Bartech-created form, establishes their hours of work, imposes its work rules on them, sets their holiday schedules, and provides training; hence Edison determines significant terms and conditions of employment of the Bartech employees. Moreover, Edison effectively recommends when a Bartech employee should be disciplined by referring him or her to on-site representative Gabryszewski. Indeed, Edison effectively terminates a Bartech employee's employment at Fermi 2 by simply requesting that Bartech not send that employee back. Bartech determines whether the employee will be put back in its own applicant pool for employment elsewhere. Hence, I find that both Bartech and Edison exercise control over substantial terms and conditions of employment of the Bartech employees. *Flatbush Manor Care*, 313 NLRB 591 (1993); *Brookdale Hospital Medical Center*, 313 NLRB 592 (1993); *Capitol EMI Music*, 311 NLRB 997 (1993); *Windemuller Electric*, 306 NLRB 664 (1992).

CONCLUSION

Based on the foregoing and the record as a whole, I conclude that Edison and Bartech are joint employers of the employees in the petitioned-for units. Accordingly, I shall direct an election be held in each of the appropriate units below.

5. The following employees of the Joint Employers constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

UNIT A: All full-time and regular part-time office clerical employees jointly employed by The Bartech Group, Inc. and The Detroit Edison Company working out of the Fermi 2 Power Plant located at 6400 Dixie Highway, Newport, MI; excluding all professional employees, confidential employees, technical employees, plant employees, and guards and supervisors as defined by the Act, and all other employees.

UNIT B: All full-time and regular part-time technical employees and plant clerical employees including but not limited to business technicians, graphic specialists, procedure writers and stockmen jointly employed by The Bartech Group, Inc. and The Detroit Edison Company working out of the Fermi 2 Power Plant located at 6400 Dixie Highway, Newport, MI; excluding all professional employees, confidential employees, office clerical employees, and guards and supervisors as defined by the Act, and all other employees.

Those eligible to vote shall vote as set forth in the attached Direction of Elections.

Dated at Detroit, Michigan, this 9th day of March 2010.

(SEAL)

/s/ Stephen M. Glasser

Stephen M. Glasser, Regional Director
National Labor Relations Board, Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226

DIRECTION OF ELECTIONS

The National Labor Relations Board will conduct a secret ballot election among the employees in each of the units found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **LOCAL 223, UTILITY WORKERS UNION OF AMERICA, AFL-CIO**. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the units who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have quit or been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on

the list should be alphabetized (overall or by department, etc.). I shall, in turn, make the list available to all parties to the election.

To be timely filed, the lists must be received in the Regional Office on or before **March 16, 2010**. No extension of time to file these lists will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file such lists. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The lists may be submitted to the Regional Office by electronic filing through the Agency website, **www.nlr.gov**,⁸ by mail, or by facsimile transmission at **313-226-2090**. The burden of establishing the timely filing and receipt of the lists will continue to be placed on the sending party.

Since the lists will be made available to all parties to the election, please furnish a total of **two** copies of the list for each unit, unless the lists are submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Posting of Election Notices

Section 103.20 of the Board's Rules and Regulations states:

a. Employers shall post copies of the Board's official Notice of Election on conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sunday, and holidays.

c. A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. [This section is interpreted as requiring an employer to notify the

⁸ To file the list electronically, go to **www.nlr.gov** and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the **File Documents** button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the **Accept** button. The user then completes a form with information such as the case name and number, attaches the document containing the request for review, and clicks the **Submit Form** button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under **E-Gov** on the Board's web site, **www.nlr.gov**.

Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).]

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.69 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001**. This request must be received by the Board in Washington by **March 23, 2010**. The request may be filed electronically through **E-Gov** on the Board's website, **www.nlrb.gov**,⁹ but may **not** be filed by facsimile.

⁹ Electronically filing a request for review is similar to the process described above for electronically filing the eligibility list, except that on the E-Filing page the user should select the option to file documents with the **Board/Office of the Executive Secretary**.

To file the request for review electronically, go to **www.nlrb.gov** and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the **File Documents** button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the **Accept** button. Then complete the E-Filing form, attach the document containing the request for review, and click the **Submit Form** button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under **E-Gov** on the Board's web site, **www.nlrb.gov**.